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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JUDY HUBER,

Petitioner,

vs.

SIMON LEIS, SHERIFF,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a deputy sheriff's First Amendment rights are violated when the deputy sheriff is reprimanded for making a formal complaint to the FBI concerning the job performance of another deputy before making that complaint to her own supervisor as required by a facially valid regulation of the Sheriff's Department.

2. Whether the within unpublished decision of the United States Court of Appeals for the Sixth Circuit constitutes an incursion into the area of protected speech by public employees.

3. Whether the petition raises any important question that needs to be addressed by the court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

UNITED STATES CODE, TITLE 42, SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, RULE 24, PUBLICATION OF DECISIONS

(a) **Criteria for Publication.** The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;

iii) whether it discusses a legal or factual issue of continuing public interest;

iv) whether it is accompanied by a concurring or dissenting opinion;

v) whether it reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or,

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

vi) whether it addresses a lower court or administrative agency decision that has been published; or,

vii) whether it is a decision which has been reviewed by the United States Supreme Court.

(b) **Designation for Publication.** There shall be a presumption in favor of publication of signed and *per curiam* opinions. A signed opinion is one in which the author's name appears at the beginning of the opinion. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.

(c) **Citation of Unpublished Decisions.** Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case. If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The facts upon which the district court based its summary judgment decision herein are not disputed by the parties, having been stipulated to by the parties as a prerequisite for the filing of their cross-motions for summary judgment (Stipulation of Facts for Cross-Motions for Summary Judgment, opening paragraph on page one). As that document indicates, these stipulated facts are drawn from three different areas of the case record:

1) those facts stipulated to in Section V, paragraph A, of the Final Pretrial Order (at pages 3-6);

2) those facts alleged in the Complaint and Jury Demand which are admitted in the Answer of Defendant Simon Leis, Sheriff, Hamilton County, Ohio; and

3) those additional facts stipulated to by the parties in paragraphs 2, 4, 5 and 6 of the Stipulation of Facts for Cross-Motions for Summary Judgment.

For the convenience of this Court, these facts are set forth in their entirety as follows:

1) From Section V, Paragraph A of the Final Pretrial Order, at pages 3-6.

Respondent Simon Leis (Simon L. Leis, Jr.) is the duly appointed [now, the duly elected], qualified and acting Sheriff of Hamilton County, Ohio, and has served as such continuously from June 1, 1987, to date.

Petitioner Judy Huber has been employed by the Hamilton County Sheriff, as a deputy sheriff assigned to his Corrections Division, for over five (5) years. Her current position is that of Correction Officer.

On January 1, 1987, the Hamilton County Sheriff adopted the Hamilton County Sheriff's Office Rules, Regulations and

Disciplinary Process, Section 1.20 (*"Sheriff's Rule 1.20"*) which reads as follows:

> **"SECTION**
>
> **1.20** Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his immediate supervisor."

Petitioner became aware of the above-quoted *Sheriff's Rule 1.20* on January 1, 1987.

On August 6, 1987, at approximately 1:50 a.m., Petitioner's son, Charles Hans, was arrested by Patrol Officer Michael H. Fieler and Sgt. Dennis M. Lantry of the Hamilton County Sheriff's Office, for criminal trespass and resisting arrest, at the Colerain Township Elementary School.

In order to participate in the search for and apprehension of the other three (3) suspects, Patrol Officer Fieler handcuffed Petitioner's son to a chain-link fence.

Shortly after the arrest of Petitioner's son, Patrol Officer Fieler notified Petitioner, who was on duty at the Justice Center, of her son's arrest.

Petitioner did not complain about the manner of her son's arrest to Patrol Officer Fieler or to Sgt. Lantry, nor did she consult about it with her immediate supervisor, nor did she discuss it with Respondent, before complaining about it to the FBI.

Petitioner did not comply with *Sheriff's Rule 1.20* before complaining to the FBI.

Petitioner complained to the local FBI Office, alleging that her son's civil rights were violated by Patrol Officer Fieler when he handcuffed her son to the fence as described above.

Petitioner first complained to FBI Agent David Lichtenfeld on or about August 10, 1987.

FBI Agent Lichtenfeld advised Petitioner to discuss the

matter with Respondent. He further advised Petitioner that if she was not satisfied with Respondent's resolution of the matter, she could bring her son into the FBI office for further discussion of the incident.

Petitioner did not allege to FBI Agent Lichtenfeld either that Respondent had in any way violated, or participated in or condoned the arresting officer's alleged violation of, her son's civil rights, or that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of the Hamilton County Sheriff, his office, or his employees.

Petitioner brought her son into the FBI office on or about August 12, 1987, and made further complaint about his arrest on August 6, 1987, speaking this time with FBI Agent Edward Woods.

Petitioner's son related to FBI Agent Woods his version of the incidents involved in his apprehension and arrest by Hamilton County Deputy Sheriffs on August 6, 1987. FBI Agent Woods asked several questons regarding the incident to which either or both responded, as appropriate. The thrust of their complaint was that Petitioner's son's civil rights were violated by an arresting deputy sheriff because he handcuffed Petitioner's son to a fence during a search for other suspects. The interview was concluded after approximately thirty (30) minutes.

Petitioner and her son did not allege either that Respondent had in any way violated, or participated in or condoned the arresting officer's alleged violation of, her son's civil rights, or that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of the Hamilton County Sheriff, his office, or his employees.

Subsequently, FBI Agent Woods reviewed their complaint with the local supervisory FBI Agent in charge of civil rights matters, relating to him that which Petitioner and her son had told him. Based upon the supervisory FBI Agent's said

review of their complaint, and in conformity with his instructions to FBI Agent Woods thereon, FBI Agent Woods closed the FBI file on the matter.

Petitioner's and her son's statements to FBI Agent Woods on or about August 12, 1987, regarding her son's arrest on August 6, 1987, and the alleged civil rights violations stemming therefrom, were considered by the FBI to be a formal complaint.

Respondent was personally unaware of and unfamiliar with the apprehenson and arrest of Petitioner's son on August 6, 1987, until after Petitioner had complained about it to the FBI. Petitioner has never discussed her son's arrest with Respondent.

On or about September 1, 1987, after ascertaining that Petitioner had violated *Sheriff's Rule 1.20*, Respondent approved and issued a written reprimand to Petitioner for said violation.

2) From the Complaint as admitted in the Answer.

Respondent's agents on hearing of the complaint initiated an investigation that was conducted by a Sheriff's detective. In addition to ascertaining the facts, the detective concluded in a report of August 19, 1987, that Petitioner demonstrated a lack of professionalism by violating *Sheriff's Rule 1.20* which provides that "Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor." Petitioner was then recommended for disciplinary action.

Thereafter on August 26, 1987 Petitioner was recommended to receive an official reprimand which was approved by Respondent Leis on September 1, 1987.

3) **From Paragraphs 2, 4, 5 and 6 of the Stipulation of Facts for Cross-Motions for Summary Judgment.**

It is Respondent's position that the policy reasons and objectives underlying *Sheriff's Rule 1.20* are the maintenance of strict discipline, high morale, first-rate job competence, and a unified effort at public service among all Sheriff's Office employees, and thereby earning, projecting and maintaining a well-deserved positive public image of the Sheriff's Office and employees.

Petitioner's typical duties include searching incoming female detainees, taking fingerprints, checking arrest records in computer files, and administrative tasks such as completing the paperwork for processing detainees, and filling out other forms.

Petitioner does not have any policy-making role in the Sheriff's Office, nor does she have a public contact role other than answering routine phone calls. She refers any callers asking policy-related questions to the appropriate supervisor.

Petitioner does not represent the Sheriff's Office or Hamilton County in its relations with the press. She does not have a close working relationship with Respondent Sheriff Simon Leis, nor does she have access to confidential Sheriff's Office information.

While the foregoing represents the sum-total of the facts stipulated to by the parties as the basis for summary judgment herein, it must be emphasized that the stipulation of facts sets forth the policy reasons and objectives underlying *Sheriff's Rule 1.20.* Despite Petitioner's assertions to the contrary, and as both lower courts recognized, Petitioner's uncontroverted violation of this rule under the particular circumstances of this case had, by definition, an adverse impact upon the discipline, morale, competence and unified effort at public service which the rule was designed to promote.

B. HISTORY OF PROCEEDINGS AND FEDERAL QUESTIONS RAISED BY PETITIONER.

Petitioner filed her within lawsuit in the United States District Court for the Southern District of Ohio, Western Division, on September 22, 1987, invoking federal jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and claiming that Respondent violated her rights under the First Amendment to the United States Constitution.

On January 4, 1989, the district court denied Petitioner's motion for summary judgment and granted Respondent's motion for summary judgment, the cross-motions having been based upon a stipulated record. The district court's opinion and order is reprinted in the appendix to the petition, at p. 6a.

Petitioner filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. In her brief, she presented the following arguments involving federal questions:

A. **In the absence of any evidence of disruption or adverse effect on governmental operations a governmental employer has not demonstrated a state interest that would justify the suppression of an employee's communication on a matter of public concern.**

B. **Sheriff's Rule 1.20 is unconstitutionally overbroad.**

On August 31, 1988, following full briefing and oral argument by the parties, the Court of Appeals affirmed the district court's decision in an opinion specifically designated by the Court of Appeals as "NOT RECOMMENDED FOR PUBLICATION." Said opinion is reprinted in the Appendix to the Petition, at p. 1a.

REASONS FOR DENYING THE WRIT

INTRODUCTION

It must be emphasized at the outset that this is a case in which neither the material facts underlying the controversy, nor the propriety of the application of the summary judgment process, are open to question:

> "The parties in the above case hereby stipulate the following facts and further stipulate that there are no other material facts that are in dispute and that summary judgment is appropriate. . . ." (Stipulation of Facts for Cross-Motions for Summary Judgment, opening paragraph.)

Thus, the proper standard for review for this Court is limited to whether or not the proper application of current relevant case law to the stipulated facts of this case supports the district court's ultimate grant of summary judgment in favor of Respondent, and the Court of Appeals' affirmance thereof.

I. THE PROPER APPLICATION OF THE CURRENT RELEVANT CASE LAW OF THIS COURT AND OF OTHER UNITED STATES COURTS OF APPEALS SUPPORTS THE DISTRICT COURT'S ULTIMATE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, AND THE COURT OF APPEALS' AFFIRMANCE THEREOF.

The lower courts' ultimate decisions in this matter, granting and affirming summary judgment for Respondent, reach the legally correct resolution of the controversy. However, while Respondent adopts both lower court decisions, incorporates them herein by reference, and advances the reasoning therein as proper and sufficient grounds for denying the Writ, Respondent submits that the granting and affirming of summary judgment in his favor were both legally mandated for a reason not relied upon by either lower court; namely, the

simple fact that Petitioner's complaints to the FBI did not address a "matter of public concern," and thus her complaints were not properly subject to First Amendment protection, and the reprimand she received for making them was not properly subject to judicial review by the district court.

Petitioner's entire position in the first part of her motion for summary judgment and her subsequent appeals is founded upon her assertion that her complaints to the FBI address a "matter of public concern" as that term has been defined by the relevant case law, and therefore that her complaints are entitled to First Amendment protection.

This crucial "threshold question" is totally unsupported, both by the foregoing stipulated facts and by the relevant case law, and, as will be demonstrated herein, Petitioner's cited authorities are either inapposite, or they support precisely the opposite conclusion. Thus, it becomes obvious both that Petitioner was not entitled to judgment below, as a matter of law or otherwise, and that Respondent Leis was entitled to judgment below as a matter of law.

It must at this point be noted and emphasized that, although the district court did indeed find as a matter of law that Petitioner's complaints to the FBI addressed a matter of public concern, this Court has the "constitutional obligation to assure that the record supports this conclusion. . . ."; "[. . . this Court is] 'compelled to examine [for itself] the statements in issue and the circumstances under which they [were] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' " *Rankin* v. *McPhereson*, 483 U.S. 378, 386, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987), citing *Connick* v. *Myers*, 461 U.S. 138, 105, n. 10, 103 S.Ct. 1684, 1692, n. 10, 75 L.Ed.2d 708 (1983), quoting *Pennekamp* v. *Florida*, 327 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted); see also *Rankin*, 107 S.Ct., at 2987, n. 9. And, it is beyond dispute that resolution of the ultimate issue herein —

whether the speech is protected — is a question of law. *Id.*, citing *Connick*, 461 U.S., at 148, n. 7, 103 S.Ct., at 1690, n. 7.

The authorities which control the case at bar are *Connick*, *supra*, and its progeny, including the recent case of *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1987).

This Court in *Connick* defined its task by referring to the case of *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968):

> "Our task, as we defined it in *Pickering*, is to seek 'a balance between the interests of the [employee], as a citizen, in *commenting upon matters of public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' 391 U.S., at 568. . . ." (Emphasis added.)

Connick, 461 U.S., at 142. However, in *Connick*, as Petitioner correctly pointed out to the district court, this Court turned the "public concern" element of the *Pickering* formulation into a threshold requirement:

> "if [a public employee's speech] . . . cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [a court] . . . to scrutinize the reasons for [the employee's] discharge." 461 U.S. at 146 (footnote omitted.)

As Petitioner correctly noted, the *Connick* Court held that the balancing of interests required by the *Pickering* decision should be done only if the public employee's speech meets this threshold requirement of constituting speech on a matter of public concern.

The *Connick* Court went on to state unequivocally:

> ". . . When employee expression cannot be fairly considered as relating to any matter of political, social, or

other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."

461 U.S. at 146 (citations omitted.)

". . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior . . .

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. . . ."

461 U.S. at 147, 148 (citation and footnote omitted. Emphasis added.)

In *Garvie* v. *Jackson*, *supra*, the Sixth Circuit Court of Appeals recently characterized *Pickering* and *Connick* in the following terms, and applied them accordingly:

". . . *Pickering* and *Connick* establish that a public employer may not *dismiss* an employee *based the employee's speech on matters that concern the public, rather than the personal interest of the speaker*, unless the employer's interest in efficient operation outweighs the employee's interest in speaking freely. . . .

> *Connick* made clear that not all criticisms directed at a public official 'would plant the seed of a constitutional case.' 461 U.S. at 149 . . ." (Emphasis added.)
>
> 845 F.2d, at 651.

It must also be emphasized that this Court wrote, after *Connick*, that:

> ". . . Statements made by public employees in their employment capacity *and not touching on matters of public concern* may be considered unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 504 n. 22 (1984). (Emphasis added.)

A review of the content, form and context of Petitioner's complaints to the FBI, as revealed by the stipulated record herein, and in light of the *Connick* decision, clearly demonstrates that Petitioner's complaints do not address a matter of public concern.

A look at the stipulated facts of this case, as quoted on pages 4-8 of this Brief, shows quite clearly the content of Petitioner's subject complaints to the FBI. Those paragraphs demonstrate unequivocally that Petitioner's only complaints to the FBI were that Patrol Officer Fieler, the deputy sheriff who arrested her son on August 6, 1987, violated her son's civil rights during that particular arrest process. That is the total sum and substance of Petitioner's complaints to the FBI.

Next, regarding the form of Petitioner's complaints, our record irrefutably demonstrates that she complained to only two (2) people about her son's arrest: FBI Agents Lichtenfeld and Woods. Respondent submits that her complaints to Agents Lichtenfeld and Woods clearly did not constitute "public" statements, and that there is nothing else in our record which would support either the conclusion that she ever intended her complaints to the FBI to be made public, or

that she herself ever made her complaints public. Thus, from their very form, it is obvious that Petitioner herself did not regard her complaints about her son's arrest as being matters for the public to be concerned about. And likewise, as the stipulated facts make readily apparent, the FBI also did not believe her complaints to be matters of public concern.

Turning to the last element, the context of Petitioner's complaints to the FBI, Respondent submits that the stipulated facts clearly demonstrate that the Petitioner was complaining to the FBI not as a "citizen" regarding a "matter of public concern," but merely as a mother and a deputy sheriff about a purely personal, employment-related concern: the allegedly improper arrest procedures employed by a fellow deputy sheriff against Petitioner's then-minor son, and what she believed to be the resulting violation of her son's civil rights. The arrest of her son at 1:50 a.m. on August 6, 1987, is the complete context in which Petitioner's complaints to the FBI arose.

Equally important, however, is what Petitioner did *not* allege or complain about to the FBI. First and foremost, the stipulated facts demonstrate uncontrovertibly that she did not accuse Respondent, any of his command or administrative personnel, or any other Hamilton County official, of any misconduct of any type whatsoever. She did not even accuse Respondent or anyone else of condoning Patrol Officer Fieler's allegedly improper arrest of her son. Indeed, she acknowledges that Respondent was personally unaware of and unfamiliar with the arrest of her son until after she made her complaints to the FBI.

Next, it must be noted and emphasized that Petitioner did not complain that the arresting officer's alleged violation of her son's civil rights was part of a pattern, custom, policy or practice of Hamilton County, or of Respondent, his office or his employees.

Lastly, because of the legal authorities Petitioner cites in support of her position, it must be noted that she made absolutely no allegations whatsoever against Respondent or anyone else regarding sexual preferences, graft, political corruption, cover-ups of committed crimes, fraudulent billings or expenditures, mismanagement of public funds, purposeful unlawful discrimination, or of any other criminal activity and/or social or fiscal wrongdoing.

In short, Petitioner alleged absolutely nothing to the FBI concerning Respondent, as well as alleging nothing that indicated any concern on her part that such an allegedly improper arrest procedure was an ongoing threat to the public, or that there were any other potential threats to the public welfare from Respondent, his office, his employees, or from any Hamilton County officials. Rather, Petitioner made purely personal, employment-related complaints, both as a mother and as a trained, experienced deputy sheriff, about a specific, particular, "one-shot" episode involving her minor son and a fellow employee/professional colleague of hers. This is clearly not the stuff of which "public concern" is made, and none of Petitioner's cited authorities support her contention or the district court's finding that it is.

In addition to *Connick* and *Bose Corp.*, Petitioner cites the following cases to support that her complaints to the FBI address a "matter of public concern": *McKinley* v. *City of Elroy*, 705 F.2d 1110 (9th Cir. 1983); *Rowland* v. *Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *O'Brien* v. *Town of Calendonia*, 748 F.2d 403 (7th Cir. 1984); *Marohnic* v. *Walker*, 800 F.2d 613 (6th Cir. 1986); *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986); *Ratliff* v. *Wellington Exempted Village School Bd. of Educ.*, 820 F.2d 792 (6th Cir. 1987); *Donohue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54 (2nd Cir. 1987); *Solomon* v. *Royal Oak Tp.*, 842 F.2d 862 (6th Cir. 1988) and *Rode* v. *Dellarciprete*, 1988 U.S.App. LEXIS 5642 (3rd Cir., April 28, 1988). While all of these cases contain convenient statements of law which

seem at first glance to support Petitioner's position herein, Respondent submits that each case arose from facts so far different and removed from the facts of the case at bar that the holdings in those cases have absolutely no application herein. *Rowland* arose from a nontenured high school guidance counselor's expression of her bisexual orientation to fellow school employees and supervisors. The Sixth Circuit Court of Appeals held that her expression was made as an employee, in a non-public manner, and upon a matter of only personal interest — not as a citizen upon a matter of public concern — and thus it was not protected speech. Thus, *Rowland* more closely supports Respondent's position herein than Petitioner's. *McKinley* and *Ratliff* both arose from public employees' public remarks criticizing their public employer's mismanagement of public money. Respondent does not submit that either of these decisions is wrong, but he does submit that the facts which gave rise to both decisions bear no resemblance whatever to the facts of the case at bar. Likewise, *O'Brien*, *Marohnic*, *McMurphy* and *Solomon* all involved public employees' public allegations of *serious criminal activity by their public employers*: graft and corruption in *O'Brien*; fraudulent billing in *Marohnic*; official corruption and cover-ups in *McMurphy*; and political corruption in *Solomon*. Once again, Respondent does not disagree with the holdings in these cases, but states simply that the facts on which they are based render them completely inapposite herein.

Lastly, the *Donohue* and *Rode* decisions were based upon public employees' public allegations that their respective public employers purposefully engaged in unlawful gender-based or retaliatory discrimination, and also, in *Donohue*, violation of the Freedom of Information Act. Once again, as Petitioner made no allegations whatever against Respondent or his command and administrative staff, much less any involving purposeful unlawful discrimination or violation of other law, both *Donohue* and *Rode* have no application herein.

Thus, all authority cited by Petitioner for the proposition that her complaints to the FBI address a matter of "public concern" is either inapposite or supports just the opposite conclusion.

Based upon what the stipulated evidence discloses about the content, form and context of Petitioner's complaints to the FBI, and in view of this Court's holdings in *Connick* and *Bose Corp., supra*, it is apparent that Petitioner's complaints to the FBI do not address a matter of public concern, do not present a First Amendment claim properly subject to judicial review, and thus do not entitle her to judgment herein as a matter of law. Such being the case, it is equally apparent that the proper application of the current relevant case law of this Court and of other United States Courts of Appeals supports the district court's ultimate grant of summary judgment in favor of Respondent, and the Court of Appeals' affirmance thereof.

II. THE WITHIN UNPUBLISHED DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONSTITUTE BINDING LEGAL PRECEDENT FOR THE COURTS WITHIN THAT CIRCUIT, AND THUS IT IS NOT AN INCURSION INTO THE AREA OF PROTECTED SPEECH BY PUBLIC EMPLOYEES.

Rule 24(c) of the *Rules of the United States Court of Appeals for the Sixth Circuit*, set forth hereinabove, makes it clear that citation of an unpublished decision of that court, in that court and in the district courts within that circuit, is disfavored; that the binding effect of an unpublished decision is limited to the parties thereto; and thus that an unpublished decision such as the one on appeal herein may be considered, at best, only as persuasive argument, and not as binding precedent.

Therefore, it is apparent that the within unpublished decision of the Court of Appeals does not represent "a very

substantial incursion into what had been an area of protected speech by public employees," as claimed by Petitioner (Petition, p. 13).

III. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT.

Simply put, this case does not involve any question requiring the exercise of this Court's guidance, despite the claims to the contrary in the Petition. The results reached by both lower courts are correct, and therefore this matter does not warrant this Court's attention.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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